EXCERPTS FROM TRANSCRIPT OF HEARING

BEFORE THE
UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:
JOHN RAMBO,
Claimant,
vs.
METROPOLITAN STEVEDORE COMPANY,
Self-Administered,
Employer.

Case No: 83-LHC-242
18-6945

Pages: 1-48

Place: San Pedro, California

Date: October 15, 1990

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UNITED STATES DEPARTMENT OF LABOR
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In the Matter of:
JOHN RAMBO,
Claimant,
vs.
METROPOLITAN STEVEDORE COMPANY,
Self-Administered,
Employer.

Case No. 83-LHC-242
OWCP No. 18-6945

San Pedro Municipal Building
Room 611-A
638 South Beacon Street
San Pedro, California

Monday,
October 15, 1990

The above-entitled matter came on for hearing, pursuant to notice, at 2:25 p.m.

BEFORE: DANIEL L. STEWART
Administrative Law Judge

APPEARANCES:

On behalf of the Claimant:

THOMAS J. PIERRY, Sr., Esq.
Magana, Cathcart, McCarthy & Pierry
301 North Avalon Boulevard
Wilmington, California

On behalf of the Employer:

JAMES J. WOOD, Esq.
3441 East Broadway
Long Beach, California 90803

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
John Rambo	27	38	43	—

* * *

[Page 3, lines 1 to 11]

PROCEEDINGS

JUDGE STEWART: This is a hearing involving a claim for compensation under the Longshore and Harbor Workers' Compensation Act. The hearing is being held in San Pedro, California, at 2:25 p.m., on October 15, 1990.

The case number is 83-LHC-242 and the OWCP number is 18-6945. This hearing is being held pursuant to the notice of hearing dated July 12, 1990.

The case has been assigned to myself, Daniel L. Stewart, to hold the hearing and to decide the case.

* * *

[Page 4, lines 13 to 25]

OPENING STATEMENT

MR. PIERRY: The trial brief that I have submitted lays out what the Claimant's position is. But for the record, so there is no misunderstanding and there is no opportunity at a later time for a court to interpret the Claimant having waived

any objections to this hearing or the introduction of evidence, let me briefly summarize my trial brief.

Your Honor, may I incorporate my trial brief into the record at this point?

JUDGE STEWART: Okay. That will be fine.

MR. PIERRY: It will be Claimant's, then, first in order.

* * *

[Page 5, lines 15 to 17]

MR. PIERRY: The Claimant requests the Court to terminate these proceedings and issue an order dismissing these proceedings on essentially two grounds.

* * *

[Page 8, lines 4 to 25 through Page 9, lines 1-6]

The second argument that I have is — the second objection — let me clean that up. Just so the record is clear, Your Honor, I want it on the record that the Claimant formally objects to the introduction of any evidence at this hearing on the guise of a 922 petition by the Employer for the reasons stated.

In addition to that, the Employer has not submitted any medical. I make an offer of proof now that they have no current medical. It is the Claimant's condition [contention] that in this circuit, in the Ninth Circuit, since 1933 in the *McCormick* case, the Ninth Circuit has held that the change of condition to justify a 922 modification has to be predicated upon a change on medical condition.

They don't have that. There is a Fourth Circuit decision, *Fleetwood*, which was recently decided, which I have cited, and I have a copy. I would be happy to give it to the court. There is a strong dissenting opinion, by the dissenting judge in the Fourth Circuit, that indicates that there are many reasons why you have to have the medical basis for a 922 petition.

Otherwise, every time the economy hiccups, you are going to either have a line of longshoremen filing 922 motions or the employer is going to be filing 922 motions. It has nothing to do with the change in the economic condition of the individual based upon his medical at the time of the finding, the time that they agreed or an order was entered establishing his disability, but rather it is due to economic conditions.

* * *

[Page 13, lines 2 to 5 and lines 21 to 25 through Page 14, lines 1 to 11]

MR. PIERRY: I know this has to end, Your Honor. It can't go on forever. If I may just quickly summarize and respond.

JUDGE STEWART: Okay.

* * *

[B]ut as far as the authority in this circuit for a 922 modification as to change of condition, the Ninth Circuit has religiously and without fail, since 1933, followed the *McCormick*, which held that in order to have a 922 modification, the condition precedent is that there was a physical change in the Claimant's condition since the time of the award.

The only decision that he can point to on that level is the Fourth Circuit *Fleetwood* decision, which is a vigorously dissented decision in the Fourth Circuit, with a vigorous dissent by one judge, who I greatly admire, Your Honor.

I think you are bound by the Ninth Circuit. We are sitting in San Pedro, California, and until the Ninth Circuit or the United States Supreme Court changes that decision, then I think you are bound by that decision.

* * *

[Page 26, lines 15 to 20]

JUDGE STEWART: Yes. You want to add it in here. Okay. (Pause.) Thank you.

Does that complete your case or are you going to have some testimony?

MR. WOOD: I would like to call the Claimant, Your Honor.

* * *

[Page 27, lines 1 to 21]

Whereupon,

JOHN RAMBO

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

JUDGE STEWART: Go ahead, Mr. Wood.

MR. PIERRY: Your Honor, again for the record, the Claimant objects to introduction of any evidence, including this testimony, for reasons already stated on the record.

JUDGE STEWART: Right. Right. Because you don't think the record should be reopened for any reason.

MR. PIERRY: That is right.

JUDGE STEWART: Okay. Go ahead, Mr. Wood.

DIRECT EXAMINATION

Q BY MR. WOOD: Would you please state your full name.

A John D. Rambo.

Q Mr. Rambo, what is your occupation?

A Longshoreman.

Q Were you so occupied in 1980, when you sustained an injury while working for Metropolitan?

A Yes.

* * *

[Page 28, lines 6 to 7]

Q In what capacity?

A Crane operator.

* * *

[Page 31, lines 4 to 6]

Q Now, currently, they show that most of your hours, the bulk of your hours, are as a gantry crane operator?

A Yes.

* * *

[Page 38, lines 23 to 25 through Page 39, line 1]

Q Has your physical condition since 1983 gotten better, or worse, or stayed the same?

A I would say at least the same, because I still can't do certain things.

* * *

[Page 41, lines 2 to 24]

A If we work tonight, we get eight hours — nine hours on the print. And if I go out — say I am 10 guys out and I don't get out tonight, tomorrow night I will be on, say, zero hours. This guy is on nine. Then I take a job.

Then I come back. I check in on nine, but he is on the board before me and he would get the job first.

Q Let me take you back to 1983. Your case was set for hearing before the United States Department of Labor, on Wilshire Boulevard. Do you remember that?

A Yes.

Q And you drove down with your attorney at the time, whose name was —

A Goldwater.

Q Goldwater. And after you checked in, you went down to the cafeteria, and you sat at one table and Mr. Goldwater and Mr. Wood sat at another table. Is that right?

A Yes.

Q Tell the Court what happened after that?

A They called me over there after Goldwater and Wood were talking, and Goldwater said that we were going to get $80 — say, $80 and some change a week. And I looked at him and Wood said — Goldwater said, "This is your settlement." And then, Wood said, "You will get this as a settlement."

* * *

[Page 42, lines 16 to 25 through Page 43, lines 1 to 11]

THE WITNESS: He told me for life.

MR. PIERRY: This is percipient testimony.

JUDGE STEWART: Mr. Wood.

MR. WOOD: It is being offered for the truth of the matter. This is what makes it hearsay. Mr. Goldwater could have told him anything. If he wants to disagree with Mr. Goldwater —

JUDGE STEWART: He said Mr. Wood.

MR. WOOD: Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I guess.

JUDGE STEWART: Well, he said he heard you say it. He has a right to testify as to what he heard you say.

Go ahead.

MR. PIERRY: That is all I have, Your Honor.

JUDGE STEWART: Any redirect?

REDIRECT EXAMINATION

Q BY MR. WOOD: Were you aware at all times that I was the attorney for Metropolitan, while your case was in litigation?

A Only when we went to court, as far as I remember.

* * *

[Page 43, lines 21 to 25, Page 44 lines 1 to 25 through Page 45, lines 1 to 8]

A I don't recall that. All I know is you said for life and Goldwater wrote it down on a piece of paper, and you two were talking about it.

Q He never told you about the provisions in the Act that provided for modification, in fact that you could modify it and get more money if you later got worse? He never discussed that with you?

A I don't know if he did or not. All I know is that it was said that I had it for life.

JUDGE STEWART: By Mr. Wood?

(Brief pause off the record.)

JUDGE STEWART: The answer was by Mr. Wood and by Mr. Goldwater.

MR. WOOD: Well, let's go back and hear it. I want to hear it myself, if I may, because the machine stopped running.

Q BY MR. WOOD: Who told you that you would have this payment for life?

A Both of you.

Q Who is both of us?

A You and Goldwater.

Q I told you that you would have this payment for life?

A We were sitting there in the cafeteria. You were on the left. You called me over later, and you were talking

about what I am going to get a week. You said, "You will get this for life." Goldwater was saying — I looked at him and he said, "Well, this is the rest of your life."

And he wrote it down in the figures. "This is what you get two weeks, and you will get this for the rest of your life."

Q And who said that?

A Goldwater said that, and you said, "For your life."

Q I said, "For your life"? I told you that?

A You were saying — between — now you are getting me confused — between both of you that I was supposed to get this for life.

* * *

[Page 45, lines 14 to 17]

Q Well, don't you think that would be germane to the discussion as to whether you are going to get something for life or not, if it could be modified?

A I understood I had it for life.

* * *

[Page 46, lines 1 to 4]

A Yes, with you, yes.

Q With me?

A Well, I mean, we were there together. You were there with —

* * *

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO
Petitioner,
v.
Director, Office of Workers' Compensation Programs; Metropolitan Stevedore Company,
Respondents.

No. 92-70783
OWCP No. 18-6945
BRB No. 91-1538

OPINION

Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
March 14, 1994 — San Francisco, California

Filed June 24, 1994

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

Opinion by Judge Leavy

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* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

OPINION

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for benefits because he was presently working at a job that paid him $1,505.21 per week — almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. §922.[1] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's physical condition can justify an award modification. A change in a claimant's wages, training, skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

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[1] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

Analysis

[1] Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages — without proof of a change in his physical condition — was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. §922. *See id.* at 86 (rejecting the petition for modification because it was not based upon "*a change in physical condition*," but rather the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. §922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. *See id.* at 1235 (Warriner, J., dissenting) (noting that "[b]eginning with the first opinion dealing with the question, [*McCormick*,] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. §922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent. *United States v. Lewis*, 991 F.2d 524, 526 n.1 (9th Cir.) *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*; and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED.